United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 24, 2005

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Century Plaza Hotel & Towers, et al.
Case 21-CA-36539

524-5056-1600

Century Plaza Hotel & Towers
Case 21-CA-36577

524-5056-2200
530-6067-2030-2500
530-6067-2030-5000
530-6067-2060-1800

The Region submitted these cases for advice as to whether the Wilshire Grand Hotel violated Section 8(a)(3) of the Act by locking out its laundry department employees and then continuing the lockout after the Union had agreed to the hotel's proposal for a six-year contract term, which had been the predominant unresolved issue. The Region also submitted these cases as to whether the Century Plaza Hotel violated Section 8(a)(5) by first telling the Union during negotiations that it would close its laundry department, and then offering to keep it open if the Union agreed to a six-year contract term. Finally, the Region submitted these cases as to whether the Century Plaza violated Section 8(a)(5) by engaging in regressive bargaining.[1]

First, we conclude that the Wilshire Grand lawfully locked out its unit employees in support of its legitimate bargaining position. Second, we conclude that the Wilshire Grand did not violate the Act by continuing the lockout after the Union agreed to a six-year contract term. Third, we conclude that the Century Plaza did not bargain in bad faith when it offered to keep its laundry department open in exchange for the Union agreeing to a six-year contract term. Finally, we conclude that the Century Plaza did not engage in regressive bargaining. Thus, the Region should dismiss these charges, absent withdrawal.

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[1] The Region originally submitted these cases to Advice by memorandum dated January 7, 2005. We remanded the cases to the Region on February 24, after the Union filed amended charges and raised new legal theories. The Region resubmitted the cases to Advice by memorandum dated August 8. This memorandum addresses the issues raised in both the January and August requests for advice.

FACTS

For several years, UNITE HERE Local 52 ("the Union") has represented the laundry department employees of five hotels located in Los Angeles, California.[2] Although the Hotels negotiate jointly with the Union, there is no multi-employer unit and the Union enters into a separate contract with each hotel. The parties' last contracts had terms of September 16, 1999 to September 15, 2004.

Beginning on August 31, 2004,[3] the Hotels began bargaining with the Union for successor collective-bargaining agreements. At this initial meeting, the Union stated that it wanted contracts with a two-year term that would expire in unison with other union contracts to which the Hotels were a party.[4] The Hotels demanded a six-year term.

On September 2, the parties held their second bargaining session. At this meeting, the Hotels announced that the Sheraton and the Century Plaza had decided to close their laundry departments.[5] The Hotels stated that the laundry employees at those two hotels either would be transferred to other positions or, if that was not possible, would be given severance pay. During this meeting, the Hotels reiterated their demand for contracts with a six-year term.

On September 8, the Union held a meeting where the attendees voted to authorize a strike. Subsequently, some pro-strike literature was distributed at the Hotels.

The Union made an information request regarding the basis for the Hotels' closure decisions and sought documentation regarding the financial aspects of the

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[2] The five hotels are: (1) the Century Plaza Hotel and Towers, (2) the Millennium Biltmore Hotel, (3) the Sheraton Universal Hotel, (4) the Westin Bonaventure Hotel, and (5) the Wilshire Grand Hotel and Centre. Any combination of these entities will be referred to as "the Hotels."

[3] All dates are in 2004 unless otherwise indicated.

[4] UNITE HERE Local 11 represents a multi-employer unit of the Hotels' non-laundry employees.

[5] At the time of the announcement, the Sheraton already subcontracted most of its laundry work and employed only four laundry employees. The Century Plaza employed 40 laundry employees.

decisions. By letter dated September 14, the Hotels stated that the Sheraton and Century Plaza were not claiming an inability to pay, but had decided they no longer wanted to be in the "laundry business" because it would require them to make capital improvements costing between $55,000 and $1.2 million, and because safety issues had led to substantial workers' compensation claims (over $100,000). The Hotels stated that there was no date set yet for the closures.

On September 15, the parties held their fourth bargaining session. After the parties reviewed the Hotels' responses to the information request, the Hotels stated that the Sheraton and Century Plaza had not relied on any documents in making their closure decisions. The Hotels then stated that the Wilshire Grand also had determined that it needed to invest about $1 million in new laundry equipment and that it did not want to do that without the benefit of a six-year contract. The Union replied that it wanted a two-year contract so it would have greater bargaining leverage in the future.

On September 16, the Wilshire Grand locked out its laundry employees.[6] On the same day, the Union received a letter from the Wilshire Grand's human resources director stating that the hotel had locked out its laundry employees because it was not willing to make a significant capital investment unless the Union agreed to a six-year contract.

Later that day, the parties held their fifth bargaining session with a federal mediator. After the Union expressed its disappointment with the lockout, the Hotels stated that they were not interested in a two-year contract. The Union then broached the subject of establishing a centralized laundry facility to replace the two closing laundries. The Hotels did not respond.

On September 17, the Hotels sent the Union a proposed settlement for the lockout. The proposal required the Union to accept a six-year contract term.

On September 21, the parties held their sixth bargaining session. The Hotels stated that, unlike the Sheraton and Century Plaza, the Wilshire Grand wanted to remain a full-service, independent hotel and did not want to close its laundry department. The Hotels reiterated that the Wilshire Grand was not willing to make a significant capital investment unless the Union agreed to a six-year contract. The Union stated it did not understand the

[6] The Wilshire Grand employs 17 laundry employees.

Wilshire's position because other hotels with shorter contract terms had made capital upgrades. The Hotels replied that it was obvious that UNITE HERE's strategy was to have all of its contracts expire in 2006 so it could then stage a nationwide strike to further its agenda. The Hotels stated that the Wilshire Grand did not want to risk that and, if the Union insisted on a two-year term, it would subcontract its laundry work. The Union then proposed a three-year contract.

On September 22, the parties held their seventh bargaining session. The Union again discussed the possibility of opening a centralized laundry facility to which the Sheraton and Century Plaza employees could be transferred. The Hotels stated they were not interested in opening such a facility at that time. The Hotels' attorney then stated that if the Union was willing to agree to a six-year contract term, he would try to get the Sheraton and Century Plaza to keep their laundries open.

On September 30, the Union received the Hotels' final contract offer. This offer made clear that the Sheraton and Century Plaza laundries would remain open if the Union accepted the offer. The offer included a no-subcontracting clause in exchange for the Union agreeing to a six-year term. Also, because of their concerns about future sympathy strikes, the Hotels included a broad no-strike clause.

On October 8, the Sheraton sent the Union a letter stating that it was locking out its laundry employees "[u]ntil such time as the Union is willing to accept our final offer" of September 30. On October 9, the Sheraton locked out its four laundry employees.

On October 12, the parties held their eighth bargaining session. In exchange for agreeing to a six-year term, the Union aggressively sought certain benefits for its members. While the parties tentatively agreed to several terms, they were unable to finalize an overall contract. In particular, the parties remained divided on the language of the no-strike clause. Absent an overall agreement, the Wilshire Grand and the Sheraton continued their lockouts.

On December 10, after a substantial gap in bargaining, the Wilshire Grand agreed to the Union's no-strike clause, which permitted sympathy strikes, and the parties executed a contract and thereby ended that lockout. Shortly thereafter, the Millennium Biltmore and the Union executed a contract with terms very similar to those in the Wilshire Grand contract. The Sheraton lockout continued.

Around December 15, the Hotels' attorney informed the Union that the Sheraton had decided to close its laundry department because the parties could not reach a contract. The parties then began negotiating a severance package for the Sheraton's four laundry employees.

On February 8, 2005, the parties held another bargaining session. The Hotels informed the Union that, with the exception of seven unit employees, the Century Plaza would layoff all of its laundry employees and subcontract the laundry work. The Hotels attributed this in part to the January 2005 closing of the nearby St. Regis Hotel, which had caused the Century Plaza to lose 25% of its laundry work and layoff about 11 of its 40 laundry employees. The Hotels also justified their position based on the significant capital improvements needed at the Century Plaza.

On June 29, 2005, the Union and the Sheraton entered into a non-Board settlement of lockout-related and other ULP charges. The four locked out Sheraton laundry employees received sizeable severance packages and the Union withdrew all charges against the Sheraton.[7]

On July 14, 2005, Century Plaza's attorney informed the Union that the hotel was for sale and that it would not be closing the laundry department in order to allow the purchasers to make their own decisions. For the same reason, the hotel would not agree to a contract containing a successorship clause or limits on subcontracting laundry work. The parties did not reach agreement. Century Plaza's attorney later informed the Region that the property would likely be sold to purchasers who would convert it into condominiums.

ACTION

We conclude that the Region should dismiss the charges, absent withdrawal.[8] First, the Wilshire Grand lawfully locked out its laundry employees in support of its legitimate bargaining position. Second, the Wilshire Grand did not violate the Act by continuing its lockout after the Union agreed to a six-year contract term. Third, the Century Plaza did not bargain in bad faith when it offered to keep its laundry open in exchange for the Union agreeing

[7] On August 3 and 4, 2005, the Region approved the withdrawal of the charges against the Sheraton.

[8] As a result of the June 2005 non-Board settlement, the Sheraton is no longer a respondent in these cases.

to a six-year contract term. Finally, the Century Plaza did not engage in regressive bargaining.

A. The Wilshire Grand Lawfully Locked Out Its Laundry Employees.

Even absent an impasse in bargaining or the threat of an imminent strike, "a lockout for the 'sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position' is not unlawful and is not inherently destructive of employee rights."[9] Rather, economic pressure in support of a lawful bargaining position is a legitimate and substantial business justification for a lockout.[10]

Here, we conclude that the Wilshire Grand lawfully locked out its laundry employees in an effort to bring economic pressure to bear in support of its legitimate bargaining position. The Wilshire Grand informed the Union in its September 16 letter that it was locking out its laundry employees because the Union would not agree to a six-year contract term. It is well established that the duration of a contract is a mandatory subject of bargaining over which neither party is obligated to yield.[11] Accordingly, the lockout here was not inherently destructive of employee rights and was not unlawful.[12]

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[9] Midwest Generation, EME, LLC, 343 NLRB No. 12, slip op. at 3 (September 30, 2004) (quoting American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965)). See also Darling & Co., 171 NLRB 801, 802-803 (1968) (neither absence of impasse or threat of imminent strike precludes finding that lockout in support of legitimate bargaining position is lawful), enfd. sub nom. Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969).

[10] See, e.g., Midwest Generation, EME, LLC, 343 NLRB No. 12, slip op. at 3 (quoting Central Illinois Public Service Co., 326 NLRB 928, 932 (1998), enfd. sub nom. Electrical Workers IBEW Local 702 v. NLRB, 215 F.3d 11 (D.C. Cir.), cert. denied 531 U.S. 1051 (2000))).

[11] See, e.g., ServiceNet, Inc., 340 NLRB No. 148, slip op. at 3 (2003) (citing Steelworkers (U.S. Pipe & Foundry Co.), 129 NLRB 357, 360 (1960), enfd. 298 F.2d 873 (5th Cir.), cert. denied 370 U.S. 919 (1962))).

[12] Cf., e.g., Movers & Warehousemen's Assn. of Washington, D.C., 224 NLRB 356, 357 (1976) (lockout unlawful because employer sought to compel agreement on a non-mandatory subject of bargaining), enfd. 550 F.2d 962, 965-966 (4th Cir.), cert. denied 434 U.S. 826 (1977); Greensburg Coca-

Although a lockout in support of legitimate bargaining demands may be unlawful if the employer's real purpose was to discourage union activities or undermine the collective bargaining process, there is no evidence of such purpose here. Thus, there is no evidence that the Wilshire Grand locked out only those unit employees who were Union members or that it conditioned rehiring on resignation from the Union.[13] Moreover, because the hotel continued to bargain with the Union during and after the lockout and even made some concessions during those negotiations, there is no evidence that the lockout was an attempt to undermine the collective bargaining process.[14] Thus, the Wilshire Grand did not violate the Act by locking out its laundry employees.

B. The Wilshire Grand Did Not Engage in Bad Faith Bargaining By Continuing to Lock out Its Laundry Employees After the Union Agreed to a Six-Year Contract Term.

A fundamental principle underlying a lawful lockout is that the union must be informed of the employer's bargaining demands that precipitated the lockout so that the employees can evaluate whether to accept the terms and return to work.[15] In Dayton Newspapers, the Board found that the employer failed to provide the union with a clear set of conditions for reinstatement, and that it continued to revise its demands with respect to requiring assurances against further work stoppages and the acceptance of operational changes.[16] The Board characterized the employer's conditions for reinstatement as a "moving target"

Cola Bottling Co., 311 NLRB 1022, 1023-24 (1993) (same), enf. denied 40 F.3d 669, 674-675 (3d Cir. 1994).

[13] See, e.g., Central Illinois Public Service Co., 326 NLRB at 933-934; Midwest Generation, EME, LLC, 343 NLRB No. 12, slip op. at 4 (parties stipulated that respondent rehired crossover employees without regard to union membership).

[14] See, e.g., Central Illinois Public Service Co., 326 NLRB at 933-934.

[15] See Dayton Newspapers, Inc., 339 NLRB 650, 657-658 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005); Eads Transfer, Inc., 304 NLRB 711, 712 (1991) (locked-out employees must be able to "knowingly reevaluate their position and decide whether to accept the employer's terms"), enfd. 989 F.2d 373 (9th Cir. 1993).

[16] 339 NLRB at 658.

which prevented the union from intelligently evaluating its position, rendering it powerless to end the lockout, and therefore held that the lockout violated Section 8(a)(3) and (1).[17]

Here, the Wilshire Grand did not create the sort of "moving target" that the Board found unlawful in Dayton Newspapers. It made clear to the Union in its September 16 lockout letter that it sought a six-year contract term. Although the Union agreed to such a term on October 12, it did so only in exchange for concessions by the Hotels on other contractual terms. Thus, this is not a case where the union unconditionally accepted the employer's demand only to find that the employer had then unilaterally changed the conditions for ending the lockout. Here, after additional bargaining, the parties were still at odds over the no-strike clause and the Wilshire Grand continued its lockout. This sequence of events does not present the type of "moving target" found unlawful in Dayton Newspapers.

C. There is Insufficient Evidence to Show That Century Plaza's September 2004 Offer to Keep its Laundry Open in Exchange For a Six-Year Contract Term Demonstrated that the Threat to Close Was Fraudulent and Bad Faith Bargaining.[18]

It is settled that "[g]ood faith bargaining necessarily requires that claims made by either bargainer should be honest claims."[19] Thus, an employer engages in bad faith bargaining where it actively misleads the union about its intentions.[20] For example, in Waymouth Farms, the employer

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[17] Id.

[18] The Union's charges present the issue of whether the Hotels bargained in bad faith by falsely threatening to close the Century Plaza laundry. They do not present the issue of whether the Hotels refused to bargain over the decision to subcontract their laundry work or the effects of that decision. In July 2005, the Century Plaza informed the Union that it was not closing its laundry, so that a purchaser could make its own decision about the laundry's continued operation. Thus, there is no reason to apply the analysis set forth in Dubuque Packing Co., 303 NLRB 386, 391-392 (1991), enfd. in relevant part 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994), which reversed Otis Elevator Co., 269 NLRB 891 (1984).

[19] NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956).

repeatedly and affirmatively misled the union during effects negotiations over the impending plant closure. Among other things, the employer indicated to the union that it was considering relocating out of state while it negotiated the purchase of a new property only six miles away, and told the union that it had yet to make a decision about the move even after closing on the new property. The Board found that such deliberate untruthfulness constituted bad faith bargaining that violated Section 8(a)(5).

Here, we conclude that there is insufficient evidence to show that the Century Plaza misled the Union in September 2004 about closing its laundry department. Unlike Waymouth Farms, where it was well documented that the employer had deliberately and blatantly misled the union regarding its plant closure and relocation plans, there is no evidence here that the Hotels created a false threat of closure to pressure the Union to accept a six-year contract term. The evidence shows only that, in September 2004, the Hotels announced the planned closure, explained that the decision was based on safety issues and an unwillingness to make substantial capital investments, stated they would either transfer or provide severance pay to affected employees, listened to Union proposals about a centralized laundry facility, and eventually offered to keep the laundry open if the Union agreed to a six-year contract term.

The Hotels' assertion during bargaining that no documents were created or used to reach the closure decision does raise suspicions about whether there was a real intent to close in September 2004. But this lone assertion, in context, is insufficient to prove that, or to warrant further investigation whether, the Hotels were intentionally misleading the Union during negotiations. On September 2, the Hotels first stated that the Century Plaza was closing because it did not want to be in the laundry business anymore. About two weeks later, on September 15, the Hotels showed, in stating that the Wilshire Grand would not make costly capital investments absent a long-term labor contract, that the Union could address such costly investments by agreeing to a long-term contract. On September 22, only one day after the Union made its concessionary proposal for a three-year contract, the Hotels made clear that the Century Plaza would remain open if the Union agreed to a six-year term. Under these circumstances, the Union could not reasonably have been under the impression that the Century Plaza was lying about its intention to close its laundry.

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[20] See Waymouth Farms, Inc., 324 NLRB 960 (1997), enfd. in relevant part 172 F.3d 598 (8th Cir. 1999).

D. The Century Plaza Did Not Engage in Regressive Bargaining in February 2005.

A party's withdrawal of its agreement on an issue and substitution of a regressive proposal is considered an indicium of bad faith bargaining, but is not a per se violation of the Act.[21] Regressive bargaining must be examined in the context of the parties' negotiations. In considering a party's justification for a change in proposals, the Board has held that although the reasons need not be totally persuasive, they must not be "so illogical as to warrant an inference that by reverting to these proposals [r]espondent has evinced an intent not to reach agreement and to produce a stalemate in order to frustrate bargaining."[22]

Applying these principles, we conclude that the Century Plaza did not engage in regressive bargaining when it again changed its position in February 2005 and announced that it would close its laundry. To begin with, the parties had yet to agree on the language of the no-strike clause, and final agreement on a complete contract did not appear to be imminent.[23] The Century Plaza then explained that it had reassessed its decision to continue operating a laundry after the January 2005 closing of the St. Regis Hotel, which caused the Century Plaza to lose 25% of its laundry work and lay off about 11 of its 40 laundry employees. This development, in light of Century Plaza's continued reluctance to make costly capital improvements, resulted in the Century Plaza concluding that it only wanted to retain valet and dry-cleaning employees and subcontract the remainder of its laundry work. Later, the Century Plaza told the Union that it was for sale and, therefore, that its laundry would remain open so that the purchaser could decide whether to continue its operation. These facts, where there is an absence of any other indicia of bad-faith bargaining, fail to show that the purpose of Century Plaza's proposed closure was to frustrate bargaining.

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[21] See, e.g., Reliable Tool Co., 268 NLRB 101, 101 (1983).

[22] Hickinbotham Bros. Ltd., 254 NLRB 96, 103 (1981), cited in Barry-Wehmiller Co., 271 NLRB 471, 473 (1984). See also National Steel & Shipbuilding Co., 324 NLRB 1031, 1044 (1997).

[23] The Region concluded that the parties were at impasse over this term.

In sum, we conclude that based on the foregoing analysis, the Region should dismiss the charges, absent withdrawal.

B.J.K.